That's Life Sdn Bhd v Dato' Haji Ismail bin Karim (as the president of Persatuan Bolasepak Negeri Johor) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02(NCvC)(W)-2541–12 OF 2018 AND J-02(NCvC)(W)-2577–12 OF 2018
HASNAH HASHIM, SURAYA OTHMAN AND AZIZAH NAWAWI JJCA
24 JUNE 2020

Contract — Termination — Wrongful termination — Termination clause in joint-venture agreement ('JVA') allowed either party to determine JVA by giving the other 30 days' notice — Period of notice to allow party at fault to remedy its breach — Whether respondent's notice terminating JVA with immediate effect breached termination clause, wrongful and invalid — Whether neither of the disputing parties entitled to damages on account of their failure to prove the same

The appellant ('TLSB') and the respondent entered into a joint-venture agreement ('JVA') under the terms of which TLSB was to make a twice-yearly monetary contribution to the Football Association of Johor ('FAJ') in return for being given billboard advertising rights at certain places. When TLSB failed to pay the second contribution amount due in the year 2013, the respondent (who was then president of the FAJ) informed TLSB that he was terminating the JVA with immediate effect. TLSB sued the respondent for wrongful termination and sought, inter alia, assessment by the Court of general, special, aggravated and exemplary damages payable to it apart from damages for loss of reputation and goodwill. In response, the respondent counterclaimed for general and special damages against TLSB. After a full trial, the High Court dismissed both the claim and counterclaim of the parties. Inter alia, the Court held that the termination of the JVA was lawful as TLSB's failure to pay the second tranche of the contribution sum gave the respondent just cause to terminate. The Court also held that the terms and conditions of the JVA did not entitle either party to raise a claim or counterclaim against the other. Both TLSB and the respondent appealed against the trial court's decision.

Held, unanimously holding the termination of the JVA to be invalid and dismissing all other claims and counterclaims by the parties:

(1) The termination of the JVA by the respondent was premature, invalid and wrong. The trial judge misdirected himself in completely disregarding the terms of the JVA. Clause 11 of the JVA provided that either party could terminate the JVA without assigning any reason by giving the other party 30 days' notice of termination to enable the other

party to remedy the breach within that timeframe. The respondent failed to give the requisite 30 days' notice and purported to terminate the JVA with immediate effect. This rendered the termination invalid (see paras 20, 28 & 35–36).

(2) There was no evidence that any of the terms of the JVA had been varied. In particular, the mode of termination in cl 11 remained untouched. Even if there was any variation, it was only with respect to the contribution sum payable by TLSB (see paras 29 & 34).

(3) Both TLSB and the respondent failed to prove the damages they alleged they had respectively suffered (see para 45).

[Bahasa Malaysia summary

Perayu ('TLSB') dan responden memasukki suatu perjanjian usaha-sama ('JVA') di bawah syarat-syarat yang mana TLSB akan memberikan sumbangan wang dua kali setahun kepada Persatuan Bola Sepak Johor ('FAJ') sebagai balasan diberikan hak papan iklan di tempat-tempat tertentu. Apabila TLSB gagal membayar jumlah sumbangan kedua yang perlu dibayar bagi tahun 2013, responden (yang ketika itu menjadi presiden FAJ) memberitahu TLSB bahawa dia akan menamatkan JVA dengan segera. TLSB menyaman responden kerana penamatan yang salah dan memohon, antara lain, penilaian oleh mahkamah untuk ganti rugi am, khas, buruk dan teladan yang harus dibayar kepadanya selain ganti rugi kerana kehilangan reputasi dan nama baik. Sebagai respon, responden menuntut tuntutan balas ganti rugi am dan khas terhadap TLSB. Setelah perbicaraan penuh, Mahkamah Tinggi menolak kedua-dua tuntutan dan tuntutan balas pihak-pihak. Antara lain, mahkamah memutuskan bahawa penamatan JVA adalah sah kerana kegagalan TLSB untuk menjelaskan peringkat kedua dari jumlah sumbangan memberi alasan adil kepada responden untuk penamatan. Mahkamah juga memutuskan bahawa terma dan syarat JVA tidak memberi hak kepada mana-mana pihak untuk mengemukakan tuntutan atau tuntutan balas terhadap sesama mereka. Kedua-dua TLSB dan responden membuat rayuan terhadap keputusan mahkamah perbicaraan.

Diputuskan, sebulat suara mengekalkan bahawa penamatan JVA sebagai tidak sah dan menolak semua tuntutan dan tuntutan balas lain oleh pihak-pihak:

(1) Penamatan JVA oleh responden adalah pramatang, tidak sah dan salah. Hakim perbicaraan terkhilaf apabila sepenuhnya mengabaikan terma JVA. Klausa 11 JVA tersebut memperuntukkan bahawa mana-mana pihak boleh menamatkan JVA tanpa memberikan sebarang alasan dengan memberikan notis penamatan 30 hari kepada pihak lain bagi membolehkan pihak lain menyelesaikan pelanggaran dalam jangka masa tersebut. Responden telah gagal memberikan notis 30 hari yang diperuntukkan dan dengan sengaja menamatkan JVA dengan segera. Ini

menjadikan penamatan tidak sah (lihat perenggan 20, 28 & 35–36).

(2) Tidak ada keterangan bahwa setiap satu terma JVA telah berubah. Khususnya, cara penamatan dalam klausa 11 tidak pernah disentuh. Sekalipun terdapat variasi, hanya berkenaan dengan jumlah sumbangan yang harus dibayar oleh TLSB (lihat perenggan 29 & 34).

(3) Kedua-dua TLSB dan responden gagal membuktikan ganti rugi yang mereka masing-masing alami (lihat perenggan 45).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm); Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)

John v Dharmaratnam [1962] 1 MLJ 187 (refd)

Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30; [1984] 2 CLJ 163, FC (refd)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] 2 CLJ 198, FC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; [1990] 1 CLJ 133, HC (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)

Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd [1988] 2 MLJ 672; [1987] 1 LNS 79 (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2012] 5 CLJ 229, CA (refd)

Appeal from: Suit No JA-22NCvC-8–01 of 2016 (High Court, Johor Bahru)

Masturina Mohamad Rodzi (Edwin Lim & Suren) for the appellant.

Abd Shukor Ahmad (Sukhdev Kaur with him) (Shukor Baljit & Partners) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] Appeal No J-02(NCvC)(W)-2541–12 of 2018 ('Appeal 2541') by the appellant is against the decision of the learned judicial commissioner ('JC') who had dismissed the appellant's claim against the respondent after a full trial and Appeal No J-02(NCvC)(W)-2577–12 of 2018 ('Appeal 2577') is the respondent's appeal against the decision of the JC dismissing the respondent's

counterclaim. Both appeals were heard together. After having heard and considered both oral and written submissions of the respective counsel for the parties, we allowed Appeal 2541 in part and dismissed Appeal 2577. We now give our reasons.

[2] For the purpose of this judgment, the parties will be referred to as they were in the High Court.

MATERIAL FACTS

[3] The plaintiff provides billboard advertising services. The defendant is the President of the State of Johor's Football Association. With the approval of the Unit Perancang Ekonomi Negeri Johor ('UPENJ') the parties entered into a joint venture as a source of income to strengthen the financial position of the State of Johor Football Association ('SFJA'). The joint venture agreement ('JVA') between the parties was executed on 8 January 2011.

[4] Under the JVA, the parties agreed that the defendant shall give the rights of advertisement sites held under temporary occupation license ('TOL') for a period of ten years commencing from 1 October 2010 and expiring on 31 September 2020. Under the terms of the JVA, the plaintiff agreed to contribute a fixed payment on a quarterly basis to the SFJA as detailed in the Schedule to the JVA. The first contribution of fixed payment shall be within one month following the end of the first quarter on 30 November 2010. Thereafter, subsequent payments shall be within one month after the end of each quarter. Both parties however, shall be at liberty to vary the mode of payment subject to mutual agreement.

[5] It is also stipulated under the terms of the JVA that the defendant shall provide all the approved advertisement sites as requested by the plaintiff. In the event the defendant is unable to do so, then the contribution shall be apportioned accordingly based on the percentage of approved advertisement sites received by the plaintiff as provided under the JVA. It is also a term under the JVA that the plaintiff shall pay yearly profits from the annual audited accounts ending every 31 December in respect of the advertising JV in the ratio of 60% for plaintiff and 40% for the defendant. The defendant shall assist the plaintiff to apply to the various local authorities for exemption from advertisement license.

[6] The plaintiff's cause of action against the defendant is essentially for wrongful termination. It is the plaintiff's pleaded case that:

(a) it had paid a total sum of RM1,397,500 to the defendant. The defendant admitted receiving only RM1,225,000;

(b) various agreements were entered with various advertisers for the purpose of generating income for both the parties pursuant to the terms of the JVA; and

(c) erected 16 units of advertising structure such uni-pole, mini-pole and freestanding structure on the approved advertisement sites.

[7] In its statement of claim (SOC) the plaintiff had claimed for the following:

(a) general damages to be assessed;

(b) future economic loss to be assessed or alternatively, special damages in the sum of RM5,498,950 to be assessed by the court;

(c) damages for loss of reputation and goodwill to be assessed by the court;

(d) aggravated damages to be assessed by the court;

(e) exemplary damages to be assessed by the court;

(f) interest over the judgment sum of 5%pa to be calculated from the date of judgment to the date of full and final settlement;

(g) costs; and

(h) further and other relief.

[8] It was contended by the plaintiff that the defendant had only provided 17 approved advertisement sites. In its statement of defence ('SOD') the defendant alleged that the terms of the JVA was varied sometime on 15 December 2012. The varied terms are as follows:

(a) the amount of contribution payable by the plaintiff is varied to RM2.5m per year wherein the sum of RM1.5m is deemed paid as contribution whilst the balance of RM1m is deemed as payment for administration fee exemption for billboard license; and

(b) the said sum of RM2.5m shall be paid by a single payment of RM1m in the first month and the balance of RM1.5m will be payable in six months after the first payment.

[9] The defendant in its counterclaim sought for the following reliefs:

(a) general damages to be assessed;

(b) special damages in the sum of RM6.5m;

(c) interest at 5%;

(d) costs; and

(e) further or other relief.

THE HIGH COURT

[10] After a full trial the learned JC dismissed the claim by the plaintiff and the defendant's counterclaim. The learned JC found that the non-payment of the RM1.5m was just cause to terminate the JVA without even invoking cl 11 of the JVA. The evidence did not show that the plaintiff had challenged the letters of demand issued by the defendant on 27 April 2014 and 28 May 2014 that the sum of RM1.5m demanded had no basis or payable. The learned JC explained in his grounds of judgment ('GOJ'):

> 51. I would therefore find that the defendant had made out a lawful basis to terminate the agreement whereby the termination had been valid. Even if it had been the case that the reason or basis for terminating the agreement had been insufficient. Clause 11 of the agreement would have allowed the defendant to terminate without giving any reason, except that this would have given rise to a claim for liquidated damages of a sum equivalent to two quarterly payments of that particular year of intended termination. However, it was never claimed by the plaintiff and neither had any position been taken that the defendant would be liable to pay this amount.

THE ARGUMENTS

[11] Learned counsel for the plaintiff submitted that the variation as contended by the defendant was not in writing. The evidence of DW2 and DW3 confirmed that the variation of the JVA was hearsay evidence as reflected in their respective witness statements ('WS'):

> DW2 (WS):
>
> Q: Sila jelaskan berkenaan Persetujuan bertarikh 15.12.2012.
>
> *J: Saya difahamkan oleh Jawatankuasa PBNJ bahawa TLSB telah di bertemu dengan DYAM Tuanku pada 15.12.2012 dan telah bersetuju bahawa bayaran tetap berdasarkan Perjanjian diubah kepada sumbangan tetap oleh TLSB untuk jumlah RM2.5 juta.*
>
> DW3 (WS)
>
> Q: Boleh Datuk jelaskan berkenaan Persetujuan ini?
>
> *J: Pihak PBNJ telah dimaklumkan melalui surat TLSB bertarikh 29.1.2013 yang ditandatangani oleh Yusaini Ali bahawa suatu persetujuan telah dicapai dengan DYAM Tuanku pada 15.12.2012 bahawa jumlah sumbangan tetap kepada PBNJ adalah berjumlah RM2.5 juta setahun dimana RM1.5 juta sumbangan dan RM 1 juta pengecualian lesen paparan iklan.*

[12] The learned JC, however, found that based on the conduct of the plaintiff the JVA was varied by the parties based on the meeting on 15 December 2012 and the letter dated 29 January 2013. Learned counsel for

A the plaintiff, however, argued that the payment of RM1m is consistent with the original terms of the JVA which stipulated the fixed contribution payable by the plaintiff:

Year	Annual Income (RM)
Year 1–2	300,000
Year 3-5	500,000
Year 6	750,000
Year 7–10	1m

B

C **[13]** It was further submitted that the letter dated 29 January 2013 should not be construed as a confirmation of a variation but merely a request to vary the purported variation, if at all. There was no correspondence between the parties on the issue of variation. Learned counsel for the plaintiff submitted that the learned JC erred in law and/or fact when he found that the JVA was
D varied by merely drawing inference from the conduct of the plaintiff.

[14] The learned JC concluded that based on cl 11 of the JVA the termination was valid. Learned counsel for the plaintiff, however, argued that
E cl 11 does not provide for termination with immediate effect but a 30 days' notice must be given before termination can be invoked. It was submitted by learned counsel for the plaintiff that if this court finds the termination of the JVA to be valid in accordance to cl 11 JVA, the plaintiff should be entitled to the sum of RM250,000 as liquidated damages.

F

[15] It is the plaintiff's case that only 17 sites were provided by the defendant to the plaintiff. The defendant in response pleaded that it had obtained the TOL for 61 sites but had not physically provided the 61 sites to the plaintiff. DW6 in his WS stated that the defendant had provided only 12 approved sites
G to the plaintiff. He referred to the letter dated 29 January 2014 which confirmed this fact. Learned counsel for the plaintiff argued that the learned JC erred when he found that 61 sites were given when in actual fact as admitted only 12 approved sites were given.

H **[16]** It was further argued by learned counsel for the defendant that the variation as stated in the letter dated 29 January 2013 was for the contribution to be RM2.5m pa.

OUR DECISION

I

The terms of the JVA

[17] Under cl 3 of the JVA the defendant shall provide all approved advertisement sites as requested by the plaintiff. If the defendant is unable to

provide all the approved advertisement sites as requested by the plaintiff, then the contribution shall be apportioned based on the percentage of approved advertisement sites received by the plaintiff as follows:

DESCRIPTIONS	UNIPOLE	MINI-POLE	OVBRIDGE	BUS STOP
UNIT TO BUILT UP				
1ST YEAR	2	20	5	5
2ND YEAR	2	20	5	5
3RD YEAR	2	20	5	10
4TH YEAR	2	20	5	10
	8	80	20	30

[18] It is expressly stipulated under the JVA that the plaintiff shall pay the defendant the yearly profits from the annual audited accounts ending every 31 December in respect of this advertising joint venture in the ratio of 60% for the plaintiff and 40% to the defendant (see: cl 4 JVA). Under the JVA the defendant shall assist the plaintiff to apply to the various local authorities for exemption of advertisement license. It is a term of the JVA that the structures erected on the approved advertisement sites shall belong to the plaintiff.

[19] Clause 10 of the JVA provided that in the event any payment as stipulated in cl 2 and cl 4 of the JVA shall remain unpaid for two consecutive payments despite the reminders given, the plaintiff shall be at liberty to terminate the JVA. At the same time the plaintiff can also commence legal proceedings against the defendant to recover all outstanding payments. Upon such proceedings being commenced the JVA shall be deemed to be null and void:

> In the event any payment set forth out in Clause 2 and/or Clause 4 hereof shall remain unpaid to PBNJ for two (2) consecutive payments despite reminders and requests to do so, then PBNJ shall be at liberty to determine this Agreement but without prejudice to the rights of PBNJ to commence legal proceedings against TLSB to recover outstanding payments and upon such proceedings the Agreement shall be treated as null and void and of no further effect.

[20] Clause 11 of the JVA reads:

> Both parties shall be at liberty to terminate this Agreement *without assigning any reason(s)* by *giving either party thirty (30) days' notice of termination*, in such event both parties shall agree to pay liquidated damages of a sum equivalent to TWO (2) quarterly payments of that particular year of intended termination.

[21] Learned counsel for the defendant argued that the terms of the JVA was varied at a meeting that was held on 15 December 2012. The parties had agreed

to increase the amount of contribution to RM2.5m per year. The meeting was referred in the letter from the plaintiff to the defendant dated 29 January 2013 (see: pp 53–54 CBD):

> 2. ... melalui pertemuan saya bersama DYAM Tuanku Sultan Ibrahim Ibni Almarhum Sultan Iskandar (Sultan Johor) pada *15hb Disember 2012* bertempat di Istana Pasir Pelangi bagi membincangkan perkara diatas dirujuk. (Emphasis added.)

[22] In the same letter the parties had also agreed to the following terms:

> Hasil daripada perbincangan bersama DYAM Tuanku, *satu persetujuan telah dicapai mengenai jumlah sumbangan tetap kepada PBNJ adalah berjumlah RM2.5 juta setahun (RM1.5 juta sumbangan dan RM1 juta pengecualian lesen paparan iklan)* dan ianya dipecahkan sebanyak dua kali iaitu bayaran pada bulan pertama berjumlah RM1.5 juta dan enam bulan berikutnya RM1 juta dan pembinaan struktur iklan dimulakan serta merta bagi membolehkan syarikat kami memasarkan papan iklan mengikut jadual. (Emphasis added.)

[23] It was further proposed by the plaintiff in the same letter that:

> ... *pembayaran dua kali itu diubah kepada RM1 juta bulan pertama dan baki RM1.5 juta enam bulan berikutnya.* Ini bagi membolehkan syarikat mempunyai masa yang mencukupi untuk mengumpul baki sumbangan berkenaan selepas usaha menaikkan papan iklan itu berjaya dilakukan. (Emphasis added.)

[24] The plaintiff also expressly stated in the aforesaid letter that it was prepared to pay the contribution of RM1m any time as required:

> 5. Pihak syarikat bersedia untuk memberikan sumbangan RM1 juta itu pada bila-bila masa diperlukan ... (Emphasis added.)

[25] Clause 2 of the JVA intrinsically explained the mode of payment of contribution in accordance to the Schedule to the agreement. Nevertheless, the parties are at liberty to vary the mode of payment subject, however to mutual agreement:

> 2) TLSB shall contribute a fixed payment to PBNJ in accordance with the Schedule attached herewith and the payment shall be made quarterly. The first (1st) contribution of fixed payment shall be made to PBNJ within one (1) month following the end of the first (1st) quarter on the 30th day of November 2010. Thereafter, subsequent payments of fixed payments shall be one (1) month after the end of each quarter. *Nevertheless both parties shall be at liberty to vary this mode of payment subject to mutual agreement ...* (Emphasis added.)

[26] No other written agreement was executed except the letter written by the plaintiff to the defendant dated *29 January 2011*. Vide a letter dated *27 April 2014* the defendant informed the plaintiff that the plaintiff have not

paid the sum of RM1.5m and gave the plaintiff 14 days' notice for payment to be made:

> Dukacita sehingga kini kami masih belum menerima baki jumlah yang telah dijanjikan oleh pihak tuan iaitu sebanyak RM1.5 juta bagi penggal kedua 2013.

[27] Premised on the non-payment of RM1.5m due in the second quarter of 2013, the defendant issued a notice of termination of the JVA dated 24 November 2014:

> Merujuk kepada perjanjian bertarikh 8hb Januari 2011 yang ditandatangani oleh pihak tuan serta surat pihak tuan kami bertarikh 29hb Januari 2013.
>
> Susulan dari surat kami bertarikh 27 dan 28 Mei 2014, memandangkan bahawa bayaran-bayaran yang telah dijanjikan oleh pihak tuan tidak dibayar mengikut tempoh yang dipersetujui, *maka pihak kami dengan ini menamatkan segala usahasama dengan pihak That's Life Sdn. Bhd, dengan serta merta* dan pihak That's Life Sdn Bhd dengan ini tidak dibenarkan menggunakan nama Persatuan bolasepak Negeri Johor sekiranya berurusan dengan mana-mana pihak. (Emphasis added.)

[28] It is also expressly stated under cl 11 of the JVA that before a termination notice is given, 30 days' notice must be given to the other party to remedy the breach. This necessarily means that before the JVA can be determined, notice to remedy must be given. The terms and conditions of the JVA before us are clear and unambiguous. The learned JC erred when he concluded that:

> 31. Purely from the conduct of the plaintiff, I am minded to find that the Agreement of 08.01.2011 had been varied by the parties based on the meeting on 15.12.2012 and captured in the letter dated 29.01.2013.

[29] We must emphasise that it is not for this court to rewrite the terms of the JVA. Upon perusal of the terms of the JVA and the various documents and correspondences between the parties it is quite clear that the learned JC did not accord sufficient judicial appreciation of the terms of the JVA and the evidence placed before him and, that he failed to take into account the prerequisites of termination as provided under cl 11 of the JVA. We are of the considered view that the learned JC had failed to apply the correct principles of construction of contract. There was no evidence of any variation of the terms of the JVA. Even if there is a variation it was only to the extent of the sum of contribution payable and not in relation to the mode of termination. cl 11 remains as it is, untouched.

[30] Therefore, notwithstanding any variation to the amount agreed to be paid the other terms of the JVA remain the same. As we have alluded earlier this court has no power to improve the terms of the agreement; whether to make it fairer or more reasonable for the parties.

[31] Gopal Sri Ram, FCJ (as His Lordship then was) in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 adopting the principles enunciated in *Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm); Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 WLR 896 observed:

> The most recent statement of the guideline to interpretation of contract statutes and other instruments is to be found in *Attorney General of Belize v. Belize Telecom* [2009] UKPC 10, where delivering the advice of the board, Lord Hoffman said:
>
> > The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms or make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed... It is this objective meaning which is conventionally called the intention of the parties or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[32] The Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 reversed the decision of the High Court and the Court of Appeal on the central issue on the interpretation of an agreement and held that the termination of the agreement was wrongful. Professor Richard Hooley's article entitled *Implied Terms After Belize Telecom* had succinctly summarised Lord Hoffman's principles in Belize:

> (1) A court has no power to improve the instrument it is asked to construe whether to make it fairer or more reasonable. It is concerned only to discover what the instrument means.
>
> (2) That meaning is what the instrument would convey to a 'reasonable person' or 'reasonable addressee' having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. This objective meaning of the instrument is what is conventionally called the intention of the parties or of whoever is the deemed author of the instrument.
>
> (3) The question of implication arises where an instrument does not expressly provide for what is to happen when some event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.

(4) In some cases, however, the 'reasonable addressee' of the instrument will conclude that the only meaning which the instrument can have, consistent with its other terms and the relevant background is that something is to happen in response to the particular event that has not been expressly provided for in the instrument's terms. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs.

(5) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means. In other words, the implication of a term is an exercise in the construction of the instrument as a whole.

(6) It follows that in every case of implication, the single question for the court is whether the implied term would spell out in express words what the instrument, read as a whole against the relevant background, would

[33] In his GOJ the learned JC referred to *SPM Membrane* and acknowledged that there must be a valid reason to terminate and that the reason for termination existed at the time of termination even though it maybe the wrong reason that was given. He concluded that the defendant had made a lawful basis to terminate the JVA and therefore the termination was valid, even though there may not be any good basis or reason to terminate:

45. The plaintiff here was complaining about the termination being unlawful and invalid. There did not seem to be any complaint at that material time that the defendant had been in breach of their agreement in not obtaining sites or approvals.

46. It was only when the defendant had terminated, with the reason stated to be that of non-payment of the sum of RM1.5m despite two reminders, had the complaints of breach surfaced. *I would treat this knee-jerk reaction as an afterthought on the part of the plaintiff, because there had not been shown any contemporaneous evidence to show that the plaintiff was unhappy or dissatisfied with the manner in which the defendant was performing its obligations under the agreement.*

47. This goes to confirm that the plaintiff had been pursuing the sites and approvals, without complaint. By their own conduct, the plaintiff would even be estopped from now advancing their interpretation of cl 3 ... to mean that such obligations fell upon the defendant.

48. The non-payment of the sum of RM1.5m would provide the defendant with cause to terminate the agreement without necessarily relying on cl 11, which can be invoked even if there were no reasons for termination but of course subject to payment of the agreed upon liquidated damages.

49. *The evidence did not show that the plaintiff had challenged the letter of demand issued by the defendant on 27 April 2014 and 28 May 2014 that the sum of RM1.5m demanded therein had no basis or had not been due or payable.* It was only after receiving the termination letter that the plaintiff reengaged the defendant. (Emphasis added.)

[34] We have examined the documents in dispute and of the considered view there was a variation of the JVA as expressly stated in the letter dated 29 January 2013. It was agreed by the parties in that the two payments in the sum of RM2.5m. However, in the same letter the plaintiff had proposed to pay RM1m first and the balance of RM1.5m to be paid in six months' time. The plaintiff paid RM1m which was accepted by the defendant. The balance, RM1.5m forms the subject matter of the counterclaim together with other damages.

[35] Both counsels agreed in submission that the termination was pursuant to cl 11 JVA which prescribed that 30 days' notice must be given to the other party. On the facts and evidence we found contrary to the finding of the learned JC that the defendant had failed to give the requisite notice of 30 days as agreed and had terminated the JVA with immediate effect. The failure to give notice rendered the termination of the JVA as invalid as it did not comply with the terms as stipulated under cl 11 of the JVA.

[36] The learned JC had completely disregarded the terms of the JVA, in particular, the non-adherence of cl 11 by the defendant for failing to give the requisite notice to the plaintiff. We agreed with learned counsel for the plaintiff that the learned JC had misdirected himself and that the circumstances and the evidence do not permit us or any reasonable court which had properly directed itself to hold the termination valid. In our judgment, the termination of the JVA vide the letter dated 24 November 2014 was not only premature but was invalid and wrong.

DAMAGES

[37] The learned JC found that based on the terms and conditions of the JVA the parties are not entitled to the claim or the counterclaim:

> 60. The terms of the Agreement had not stipulated a contractual obligation to pay those contributions followed by default provisions. Instead, there had been an exit Clause 11.
>
> 61. I would therefore find that the spirit and intendment of the Agreement as expressed by the terms and conditions therein would not entitle either parties to claim or counterclaim as they had done here.

[38] The plaintiff in its SOC had specifically sought for the following as damages:

(a) general damages to be assessed;

(b) future economic loss to be assessed or alternatively, special damages in the sum of RM5,498,950 to be assessed by the court;

(c) damages for loss of reputation and goodwill to be assessed by the court;

(d) aggravated damages to be assessed by the court; and

(e) exemplary damages to be assessed by the court.

[39] It is trite law that the party claiming damages bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr FCJ, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 elucidated, at p 784 (MLJ); p 20 (CLJ), paras b–f:

> Firstly, that part of the judgment of the Judge which provides that the Vendor shall pay to the purchaser damages to be assessed for wrongful termination of the Agreement with costs and that Tan Sri Khoo and the Vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having *to prove its loss* (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd.* 64, TLR 177, 178:
>
> > ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying:
> >
> > 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[40] This dictum was referred to and applied by our Court of Appeal in *John v Dharmaratnam* [1962] 1 MLJ 187. In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; [1990] 1 CLJ 133, the court had occasion to say this (at p 367 (MLJ)):

> It is axiomatic that a plaintiff seeking substantial damages has the, burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William*). And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages.
>
> See, for example *Dixon v Deveridge* and *Twyman v Knowles*.
>
> In *Malaysian Rubber Development Corporation Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569; [1994] 4 CLJ 783, at 582 E to F, Mohd Dzaiddin, SCJ, speaking for the Supreme Court quoted, with approval, the above passage in the *Popular Industries* case.

[41] In this appeal the plaintiff bears the burden of proving both the fact and the amount of damages suffered as a result of the wrongful termination. Special

damages unlike general damages must be specifically pleaded and strictly proved, and recoverable only where they can be included in the proper measure of damages (see: *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30; [1984] 2 CLJ 163 (FC) and *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198 (FC) and *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672; [1987] 1 LNS 79).

[42] The Court Appeal in *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229 held, inter alia, as follows:

> It is trite law that the task of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is a judicial one, as it is not exercised based on whims and fancies, but by reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment.

[43] It is clear from the GOJ as explained by the learned JC that the trial was not bifurcated in that the learned JC was to decide on liability first then assessment of damages will be decided after liability is determined. The learned JC had in fact in his GOJ clearly stated the tenets of proving damages (see: paras 54–61 GOJ) and that the parties failed to prove its claim:

> 62. No damages had been shown or proven by the Defendant in it a counterclaim, as the business arrangement under the Agreement was such that no costs would be incurred by the Defendant.

[44] In the light of the above settled principles and the law on assessment of special damages the plaintiff had failed to prove the damages that it alleged it had suffered. In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention was warranted.

[45] For the reasons we have stated above, Appeal No 2541 is allowed in part in that the termination is invalid. However, since the plaintiff had failed to prove the damages it had suffered, the plaintiff is not entitled to any damages. For the same reasons we have highlighted above, the defendant had failed to prove the damages it allegedly had suffered, thus we dismissed Appeal No 2577. We varied and set aside the order of the High Court dated 15 November 2018 to the extent stated. We ordered no order as to costs.

Order accordingly.

Reported by Ashok Kumar